IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 112 of 2002

to

CRIMINAL APPEAL No 209 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 to 5 NO

JAMNADAS NARSINHDAS SUTHAR ASSTT.OCTROI OFFICER AND

Versus

GUJERA TEXTILES (PARTNERSHIP FIRM)

Appearance:

1. Criminal Appeal No. 112 of 2002

MR PRASHANT G DESAI with MR MRUGAN PUROHIT for Petitioner No. 1

NOTICE SERVED for Respondent No. 1-2

MR AJ SHASTRI for Respondent No. 3-6

MR ARUN D OZA PUBLIC PROSECUTOR for Respondent No. 7

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 20/08/2002

C.A.V.ORAL JUDGEMENT

1. This group of appeals are preferred by the Assistant Octroi Officer and Prosecution Inspector of the Octroi Department of Surat Municipal Corporation against the judgment and order dated 25.6.2001 of the learned Judicial Magistrate, First Class (Municipal Court), Surat in Municipal Cases No.8981 to 9078 of 1994, whereby, the respondents herein are acquitted of the offences punishable under Section 398 of the Bombay Provincial Municipal Corporation Act, 1949 (for short 'the Act') and Rules 13 (1) (e), 13 (2), 28 (1) and 28 (2) (b) of the Octroi Rules of the Municipal Corporation.

2. The short and simple basic facts of the case are that the officers of the Octroi Department of the Municipal Corporation inspected the premises of the respondents on 23.2.1994 and found out three bill-books indicating sale of goods to various parties and import of goods into the municipal limits without payment of octroi. A notice dated 9.3.1994 was, therefore, issued to the respondents calling upon them to produce the receipts, if any, indicating payment of octroi on the goods sold. Statements of 15 buyers of the goods sold by the respondents were also recorded which revealed that the goods were imported within the limits of the Corporation and the liability to pay octroi was that of the seller. The respondents did not respond to the notice at all. Therefore, different criminal cases were filed regarding evasion of octroi. The complainant and the accused parties being the same and the offences alleged against the accused also being the same of evasion of octroi as indicated by a number of different bills, initially separate cases for each set of three bills were filed but all the cases were, by consent, consolidated and have been disposed by a common judgment from which the present appeals are preferred. It was never the case of the respondents that any amount by way of octroi was paid on the goods alleged to have been imported and sold to the parties within the City area of Surat. The defence of the respondents was that the importation of the goods within the limits of the Corporation was not proved, nor was it proved that the the respondents No.2 to 6 were partners of respondent No.1 firm. It was also claimed that the service of notice dated 9.3.1994 was also not proved and the statements of the buyers were also not proved by examining them as witnesses. Accepting the defence

pleaded, the respondents have been acquitted by the impugned judgment.

2.1 The prosecution led oral evidence in the form of depositions of the officers of the Octroi Department vide Exhibits No.26, 96 and 324 and also produced documentary evidence in the form of Octroi Officer's Report (Exh.28), notice dated 9.3.1994 (Exh.29), its A/D slip (Exh.30), 15 statements of the buyers (Exhs.309 to 323) and duplicate copies of the bills (Exhs.116 to 308). Since the accused had their factory at Pipodra, outside the octroi limits, and the goods were alleged to have been sold from the local office to the local parties of Surat, the importation of the goods and the liability to pay octroi by the accused were sought to be proved by the statements of the buyers. And, in order to prove the statements (Exhs.309 to 323), the prosecution filed an application dated 11.6.2001 (Exh.327) to issue summons to five such parties. The learned Magistrate on perusal of the statements of the buyers took the view that one who imported or abetted the importation of the goods without payment of octroi would also be liable to be punished under Section 398 of the Act. Therefore, on the same day, rejecting the application for issuance of witness summons, the learned Magistrate ordered the issuance of notice calling upon those 15 parties whose statements were on record (Exhs.309 to 323) to show cause as to why they should not be impleaded as accused under Section 319 of the Code of Criminal Procedure. Even as some of such summoned buyers were served and eight of them were unserved by 18.6.2001, the learned Magistrate, on 25.6.2001, made the impugned order acquitting the accused on the one hand and another order below Exh.1 in Municipal Case No.8981 of 1994 dropping the proceedings under Section 319 against the parties summoned to appear as accused. Thus, the essential witnesses and signatories of the most important documentary evidence were first sought to be converted into accused and then abruptly the proceedings were wound up against them as well as the original accused by the impugned order. The order below Exhs.3 to 7 clearly appears to be a gratuitous act of the learned Magistrate since none of the parties had made any prayer for joining the witnesses as accused. It is also shocking to note that in support of the aforesaid order, the Court adopted the perverse reasoning that the statements at Exhs.309 to 323 and the depositions of the witnesses indicated that those buyers had imported the goods and they were also, prima facie, responsible for the offences; whereas, in the impugned judgment, those statements were discarded as the contents thereof were not proved. Thus, in short, the alleged

evasion of octroi in scores of cases and running into thousands of rupees has gone unpunished after eight years of proceedings resulting into miscarriage of justice.

3. Although the appeals were argued on several other issues also, it is apparent that this was a case of mistrial wherein full and necessary evidence was not allowed to be led for the prosecution. As observed by the Supreme Court in MICHAEL MACHADO AND ANOTHER v. CENTRAL BUREAU OF INVESTIGATION [AIR 2000 SC 1127], the discretionary power conferred upon the Court under Section 319 should be exercised only to achieve justice and the Court must address itself to the other constraints. It was, therefore, urged that the impugned judgment and order acquitting the respondents should be reversed with a direction to allow leading of further evidence for the prosecution and to conduct the trial de novo from that stage. The learned counsel for the respondents (accused) relied upon the judgment of the Supreme Court in ABINASH CHANDRA BOSE v. BIMAL KRISHNA SEN [AIR 1963 SC 316] to point out that an order for retrial would not be justified simply because the prosecution did not adduce all the evidence that could have been produced in support of its case. That legal proposition is obviously based upon a different factual footing. The pertinent observations, as under, made by their Lordships of the Privy Council in the case of SHEO SWARUP v. KING EMPEROR [1934 PC 227 (2) (A)] are apposite:-

> "(13) There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has "obstinately blundered", or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result.
>
> Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed."

4. It is also observed by the Supreme Court in RAMBHAU AND ANOTHER v. STATE OF MAHARASHTRA [(2001) 4 SCC 759] in the context of the appellate Court's power under section 391 of the Cr.P.C. that it is the concept of justice which ought to prevail and in the event the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.

4.1 The observations of this Court in JOHAN HAMILTON CHRISTIAN v. TAPTI CORPORATION [1998 (2) G.L.R. 1270] were relied upon in support of the submission that avoiding of octroi is also in the nature of an economic offence as octroi duty is in the nature of revenue for the local government. Since the other issues regarding the proof of the contents of the duplicate copies of the bills and the actual fact of importation of the goods into the octroi limits of the City are closely related to and partly dependent upon depositions of the buyers who could not be examined for the prosecution by virtue of the order below Exh.327, it would be of little use and hazardous to discuss and examine the order of acquittal on the basis of truncated evidence.

5. In these facts and circumstances, this case is found and held to be one of the exceptional cases in which a retrial is required to be ordered and not only the impugned judgment and order but the order below Exh.327 is also required to be set aside. The appeals are, therefore, allowed and the original Municipal Cases No.8981 to 9078 of 1994 are ordered to be retried from the stage of the application at Exh.327 with liberty to the appellant to lead such further evidence as may be necessary and to conduct the trial de novo from that stage in accordance with law. Since considerable time has elapsed since the alleged commission of offences,

these cases remanded for retrial shall have to be conducted and disposed on priority basis and as expeditiously as practicable. There shall, however, be no order as to costs. Record & Proceedings be returned forthwith.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)